SUBJECT INDEX

PAGE

Enlarged statement of the proceedings 3

Summary of argument 19

Argument 12

Point I. Contrary to the contentions of the appellees in their motions to dismiss, customers of regulated public utilities have rights as such which are protected by the Constitution of the United States. The Fourteenth Amendment forbids authorization by a state administrative regulatory commission of a final increase by a public utility corporation in its charges to its customers until after a full due process hearing has been conducted by the commission 12

The authorities they cite do not support the appellees' contention that the Fourteenth Amendment has no force 16

Point II. After the California Public Utilities Commission has made a finding of reasonableness and has authorized increases in a utility's charges, the affected customers may not bring any collateral attack in the California courts, nor may they question such increases in a reparation proceeding before the commission. The customers' sole remedy for Fourteenth Amendment violations preceding such a commission order is in a review proceeding, following the commission's refusal to rehear its order, or on appeal to this court from the judgment therein, as here 23

Point III. Although the commission has governmental powers, to be exercised like all such powers to promote the public welfare, it does not on such account "represent the public" so that its powers can be exerted without restriction by the Fourteenth Amendment 27

PAGE

Point IV. The appellants' opposition to the interim motion did not waive any constitutional claims for them or for others, and the denial of due process is established in the record 29

Point V. The appellees' other dilatory pleas are without merit.. 33

A. The appeal is not moot..... 33

B. The appellants were all plaintiffs below and are parties of record here, with standing in themselves, and in representative capacities, to urge the Fourteenth Amendment violations..... 37

1. The appellant cities have standing in their own behalf 38

2. The individual appellants..... 40

3. The appellants as customer representatives..... 42

Point VI. In any event the appellees' dilatory pleas go to this court's discretion, and not to its jurisdiction. The Court should brush such quibbles aside and come to grips with the basic question presented on this appeal..... 45

Conclusion 45

TABLE OF AUTHORITIES CITED

CASES	PAGE
Barrows v. Jackson, 346 U. S. 249	11, 45
Bartlesville v. Corporation Commission, 82 Okla. 160, 199 Pac. 396	21
Boston Real Estate Board v. Department of Public Utilities, 334 Mass. 477, 136 N. E. 2d 243	21
Carlsen v. United States, 107 Fed. Supp. 398	20
Childs v. Brooklyn Edison Co. of New York, 105 N. Y. S. 2d 503	22
City of Atlanta v. Ga. Ry. & Power Co., 149 Ga. 411, 100 S. E. 442	22
City of Birmingham v. Southern Bell Tel. & Tel. Co., 234 Ala. 526, 176 So. 301	22
City of New Haven v. New Haven Water Co., 132 Conn. 496, 45 A. 2d 831	21
City of New York v. New York Telephone Co., 261 U. S. 312, 67 L. ed. 673, 43 S. Ct. 372	28
City of Pittsburgh v. Federal Power Commission, 237 F. 2d 741	44
Clemmons v. Railroad Commission, 173 Cal. 254, 159 Pac. 713	42
Consumers' Gas Co. v. Corporation Commission, 95 Okla. 57, 218 Pac. 126	21
Detroit, Fort Wayne & Belle Isle Railway v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 S. Ct. 540	32
Doty v. Love, 295 U. S. 64, 79 L. ed. 1303, 55 S. Ct. 558	32
Edward Hines Yellow Pine Trustees' v. United States, 263 U. S. 143, 68 L. ed. 216, 44 S. Ct. 72	31
Gateway City Transfer Co. v. Public Service Commission, 245 Wis. 304, 14 N. W. 2d 6	21, 28
Georgia v. Pennsylvania Railroad Co., 324 U. S. 439, 89 L. ed. 1051, 65 S. Ct. 716	43
Hanlon v. Eshleman, 169 Cal. 200, 146 Pac. 656	28

PAGE

Hollis v. Kutz, 255 U. S. 452, 65 L. ed. 727, 41 S. Ct. 371..... 1, 7, 10, 12, 13, 16, 18, 26

Kansas City Power & Light Co. v. Midland Realty Co., 338 Mo. 1141, 93 S. W. 2d 954..... 17

Lenihan v. Tri-State Telephone & Telegraph Co., 208 Minn. 172, 293 N. W. 601..... 22

Los Angeles Railway Corp. v. Railroad Commission and the City of Los Angeles, 280 U. S. 145, 74 L. ed. 234, 50 S. Ct. 71..... 21

McCormick v. Westchester Lighting Co., 141 Misc. 261, 252 N. Y. S. 454..... 22

Midland Realty Co. v. Kansas City Power Light Co., 300 U. S. 109, 81 L. ed. 540, 57 S. Ct. 345..... 17

Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282, 78 L. ed. 1260, 54 S. Ct. 692..... 31

Morgan v. United States, 298 U. S. 468, 80 L. ed. 1288, 56 S. Ct. 906..... 30

Nashville, Chattanooga, & St. Louis Railway v. Tennessee, 262 U. S. 318, 67 L. ed. 999, 43 S. Ct. 583..... 31

Pacific Telephone & Telegraph Company v. Eshleman, 166 Cal. 640, 137 Pac. 1119..... 29

Pederson v. Portland, 144 Ore. 437, 24 P. 2d 1031..... 38

Prendergast v. New York Tel. Co., 262 U. S. 43, 67 L. ed. 853, 43 S. Ct. 466..... 37

Public Utilities Commission v. Wichita Railroad & Light Co., 268 Fed. 37..... 33

Railroad Commission v. Los Angeles Railway Corp., 280 U. S. 145, 74 L. ed. 234, 50 S. Ct. 71..... 38

Sale v. Railroad Commission, 15 Cal. 2d 612, 104 P. 2d 38..... 28

Smith v. Illinois Bell Telephone Co., 270 U. S. 587, 70 L. ed. 747, 46 S. Ct. 408..... 26, 28

State v. Mountain States Tel. & Tel. Co., 54 N. M. 315, 224 P. 2d 155..... 20, 22

PAGE

State v. Municipal Corporations of Scotland Neck, 243 N. C. 193, 90 S. E. 2d 519 22

State v. Rawlings, 229 Ind. 552, 99 N. E. 2d 597 22

State ex rel. Case v. Public Serv. Commission, 298 Mo. 303, 249 S. W. 955 17

Ten Ten Lincoln Place v. Consolidated Edison Co., 190 Misc. 174, 73 N. Y. S. 2d 2, aff'd 273 App. Div. 903, 77 N. Y. S. 2d 168 22

Union Dry Goods Co. v. Ga. Public Service Corp., 145 Ga. 658, 89 S. E. 779 22

United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U. S. 332, 100 L. ed. 373, 76 S. Ct. 373 ..... 17, 18

United States v. Merchants, etc., Assn., 242 U. S. 178, 61 L. ed. 233, 37 S. Ct. 24 ..... 16, 27

United States v. Miller, 317 U. S. 369, 87 L. ed. 336, 68 S. Ct. 276 32

United States Light & Heat Corp. v. Niagara Falls Gas & Electric Co., 47 F. 2d 567 20

Wichita Railroad & Light Co. v. Public Utilities Commission, 260 U. S. 48, 67 L. ed. 124, 43 S. Ct. 51 ..... 1, 2, 10, 12, 14, 16, 17, 18, 19, 22, 26, 32

Williams v. Mayor, 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431 .. 39

STATUTES

Act to Regulate Commerce of 1887, Sec. 4 17

Act to Regulate Commerce of 1887, Sec. 13 17

Act to Regulate Commerce of 1887, Sec. 15 17

California Constitution, Art. XI, Sec. 8 38

California Constitution, Art. XI, Sec. 8½ 38

California Constitution, Art. XI, Sec. 11 38

California Constitution, Art. XI, Sec. 12 38

California Constitution, Art. XI, Sec. 13 38

California Constitution, Art. XI, Sec. 19 ..... 38, 39

PAGE

California Public Utilities Code, Sec. 310 5
California Public Utilities Code, Sec. 454 5
California Public Utilities Code, Sec. 728 ..... 5, 15, 18
California Public Utilities Code, Sec. 729 5
California Public Utilities Code, Sec. 734 ..... 25, 42
California Public Utilities Code, Sec. 1701 5
California Public Utilities Code, Sec. 1705 42
California Public Utilities Code, Sec. 1706 5
California Public Utilities Code, Sec. 1709 ..... 25, 42
California Public Utilities Code, Sec. 1731 ..... 23, 41, 42
California Public Utilities Code, Sec. 1732 23
California Public Utilities Code, Sec. 1735 24
California Public Utilities Code, Sec. 1756 ..... 24, 42
California Public Utilities Code, Sec. 1757 24
California Public Utilities Code, Sec. 1758 25
California Public Utilities Code, Sec. 1759 ..... 25, 42
California Public Utilities Code, Sec. 1760 25
Natural Gas Act, Sec. 4(e) 19
United States Constitution, Fifth Amendment 13, 18, 19
United States Constitution, Fourteenth Amendment .....
.....2, 9, 10, 11, 14, 16, 18, 19, 20, 21, 35, 36, 37, 42, 45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 656

THE CITY OF LOS ANGELES, a municipal corporation, the CITY OF LONG BEACH, a municipal corporation, ROGER ARNEBERGH and WALHFRED JACOBSON,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and C. LYN FOX, PETER E. MITCHELL, MATTHEW J. DOOLEY, THEODORE H. JENNER and EVERETT C. McKEAGE, as members of and constituting the said Public Utilities Commission,

Appellees.

On Appeal From the Supreme Court of the State of California.

BRIEF IN OPPOSITION TO THE APPELLEES' MOTIONS TO DISMISS.

The appellees' motions to dismiss this appeal are essentially briefs on the merits, although this Court does not yet have the printed record before it. Primarily, they attempt to persuade the Court *at this juncture* that the judgment below was right upon the asserted facts outlined in them.

But even with that approach the appellees apparently do not really hope to persuade this Court at this stage to overrule *Hollis* and *Wichita* (*Hollis v. Kutz* (1921), 255 U. S. 452, 65 L. ed. 727, 41 S. Ct. 371, and *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922), 260 U. S. 48, 67 L. ed. 124, 43 S. Ct. 51), for their principal reliance is upon pleas in avoidance, based upon factual suggestions which might be misleading.

This proposition inescapably remains:

Any order by this Court dismissing the appeal would be construed by the Commission and the telephone companies, and by other commissions and other regulated public utility corporations throughout the United States, as a determination by this Court that the Fourteenth Amendment offers full protection to regulated public utility corporations, but denies any protection whatever to utility customers.

Or to put it another way: that public utility customers are wholly subject to the most arbitrary state action that state administrative boards and state courts may wish to take or sustain, without heed to the Constitution of the United States and without fear of hindrance by any Court of the United States.

It is unfortunate indeed, that a constitutional issue of this magnitude is sought to be avoided by every quibble and cavil that could possibly be urged, for even though the appellees do finally urge that the Fourteenth Amendment does not protect public utility customers, and assert that its protection in state administrative rate proceedings extends only to utility corporations (Com.'s motion, Point II, esp. pp. 11-14, and Co's. motion, Point IV, pp. 19-25), they preface that basic denial with nearly every imaginable dilatory plea.

However, none of the appellees raises any real question as to this Court's jurisdiction, nor are there basically any contentions in their motions that the ultimate question presented has been directly determined by this Court adversely to the appellants' submission, that this Court has ever overruled or ever distinguished its essential holdings in *Hollis* or in *Wichita,* or that the question raised by the appeal is otherwise unsubstantial.

Least of all is there any claim by the appellees that the basic question presented is so unimportant that its determination does not justify its consideration by this Court at length, upon a printed record, after briefs on the merits have been filed, and after oral argument has been received.

In this context, the appellees' contentions on that basic question will be considered first in the argument of this brief. This, however, as well as the subsequent discussion of the appellees' dilatory pleas will involve some additional consideration of the procedural facts, in order that the appellees' assertions may not be misleading.

The following enlarged statement of the proceedings cannot be avoided under these circumstances. Nevertheless, what is now set forth was indicated in the appellants' jurisdictional statement, and as appears from the references given, all of it was shown to the Court below, except for the matter which is stated parenthetically.

Enlarged Statement of the Proceedings.

The four appellee telephone companies are the Pacific Telephone and Telegraph Company (Pacific), General Telephone Company of California (General), California Water & Telephone Company (California Telephone), and Sunland-Tujunga Telephone Company (Sunland).

Telephone companies conducting an intrastate business in California have historically filed with the appellee California Public Utilities Commission (the Commission) formal written applications for authorization, when they have proposed general increases in charges to their customers (Pet. pp. 3, 19, 20, 41, 53-55). The Commission has required extensive notice of such an application to be given (Reply, p. 2).

Soon thereafter the Commission has set an initial hearing, and notice thereof has been widely given by mail and otherwise by the Commission itself (Reply, p. 41).

(Typically the notice mailed by the Commission has been accompanied by a statement that the applicant's exhibits and affirmative testimony will be received at the initial hearing and that dates for subsequent sessions will then be fixed. This makes it clear that other parties will not be expected then to undertake any extended cross-examination or to prepare their direct evidence in opposition to the application by that time.)

As so fixed, the next session is usually some months in the future. This has permitted affected cities, other customer representatives, and the Commission staff, during the time intervening, to prepare for cross-examination of the applicant's witnesses and to prepare exhibits and testimony in their own behalf (Reply, pp. 52-53). (Generally the length of such adjournment has been fixed by the presiding commissioner according to representations by the Commission's staff and by cities and other parties as to the time which they will require for these purposes.)

Persons, firms, associations and private and public corporations appearing in such proceedings appear as parties and are referred to as parties. The hearings are conducted like judicial trials or hearings. Witnesses are sworn and are formally examined and cross-examined. Exhibits are marked for identification and afterward offered in evidence upon testimony explaining them. Objections are made to questions and to offers of evidence and are argued and formally ruled upon. Motions like those in judicial trials are made, argued, submitted and decided by the presiding commissioner, or upon his reference, by the Commission itself (Pet., Appx., pp. 1-11, 14).

All of this, including the form and contents of the applications and the conduct of the proceedings normally conforms to the applicable provisions of the California Public Utilities Code (see Jurisdictional Statement, Appendix (G), pp. 69-79, incl., and esp. Secs. 310, 454, 728, 729, 1701 and 1706), to the Commission's General Orders and to the Commission's promulgated Rules of Procedure (Pet., pp. 53-55).

This established procedure was followed upon Pacific's application, involved here, No. 39309, for certain increases in its intrastate rates throughout its system in California. The application was filed on August 7, 1957, and on September 6, 1957, the Commission issued its notice of a hearing in San Francisco thereupon on September 25, 1957 (Pet., p. 20). As stated in the appellees' motions, extensive notice of that hearing including notice to the appellant City of Los Angeles and the appellant Roger Arnebergh, was given by the Commission. It should be emphasized however, that no notice was given to the appellant City of Long Beach or to the appellant Walhfred Jacobson, presumably because they are directly served by General, and not by Pacific.

The formal notice of this initial hearing which was mailed to Los Angeles and Arnebergh, and to some others within Pacific's service areas, was accompanied by a letter from the Commission which made it clear that the initial hearing would be for the reception of the applicant's primary evidence, for limited further inquiry if time should permit, and for the scheduling of hearings to be held some months later. *No indication was given that any proposal for interim relief would be made or entertained* (Pet., p. 20).

As stated by the Commission the hearing upon Pacific's application commenced as scheduled on September 25, 1957, and a total of 32 days of hearings and argument were held at intervals thereafter until the reception of evidence was finally concluded on March 6, 1958. The dates which are critical here, however, are September 25 and 26, 1957, when the hearings and argument upon Pacific's application were proceeding consistently with the Commission's letter of advice, September 27, when the telephone companies made their motion, without prior notice, for an "interim" order authorizing increases in charges by all of them, October 3 and 4, 1957, when "hearings" and argument upon that motion were conducted before the Commission, purportedly during the course of hearings upon Pacific's application and upon two conjoined complaint cases, and October 10, 1957, when the motion for "interim" relief was taken under submission by the Commission (Pet., pp. 21-27).

(The transcript of the hearings conducted on those six days extends over 1055 pages: the transcript of the hearings on the other twenty-six days until Pacific's application was finally submitted for decision occupies 3,937 pages.)

It should be emphasized that the motion for interim relief proposed general increases in certain rates charged by General, California Telephone and Sunland, as well as increases in certain rates charged by Pacific, although rate increase applications by those three companies were not before the Commission when the motion for interim relief was entertained or when it was submitted for decision (Pet., pp. 22-23).

California Telephone had, indeed, on December 21, 1956, filed an application, No. 38685, for a general increase in its rates, and some hearings thereon had been

had, but that application was not before the Commission in connection with the motion for interim relief (Pet., pp. 19-20). General did not even have an application on file for any increase in its charges when the motion for interim relief was made. It did get such an application on file on October 10, 1957, the day the motion for interim relief was taken under submission, but such application was not then before the Commission for hearing or decision (Pet., p. 40; Reply, p. 2). The first hearing had thereon was several months later, on January 6, 1958 (Pet., p. 40).

Sunland did not get any application on file until long after the Commission had decided the motion for interim relief by its Decision No. 55936 on December 10, 1957 (Reply, p. 2).

The two complaint cases (Case No. 5974 and Case No. 5983) which were conjoined for hearing with Pacific's application, by an order summarily made on September 27, 1957, were not applications for authority to increase any charges to customers, but were instead simply complaints, by California Telephone in one case and by Pacific in the other case, in which action by the Commission was asked affecting the division of certain interchanged revenues among the four companies. The consolidation of these two cases with Pacific's application, for hearing purposes, created no issues before the Commission as to the levels of the charges by the three companies other than Pacific, provided no procedural vehicle for the Commission's authorization of increases in the charges of those three companies, and carried no notice to their customers that their charges might be increased as a result of such consolidation (Pet., pp. 4, 20-21).

The factual situation is not complicated, but the motions to dismiss make it seem so, and they create the impression that the appellants' case rests on claims that the

notice given of Pacific's application and of the commencement of hearings thereon was insufficient, and that full hearings were not finally had upon Pacific's application.

Such is not the case. The facts are actually simple and the appellants' claims are plain: there was no proceeding pending before the Commission in which there was in issue the level of the charges of all four telephone companies for the multi-message unit services rendered by them to their customers in the Los Angeles area. Nevertheless, without any notice whatever that such a motion would be made or that such issues would be raised thereby, the four companies came before the Commission with a motion asking authority to increase such charges. Inescapably, this motion raised issues not only as to the revenues and expenses of that particular service by each company, but as to the total revenues and total expenses of the four companies in their intrastate operations in California, as to the required rate of return of each of the four companies, and as to the earnings of each of them in the Los Angeles area as compared with their returns from their operations outside of the Los Angeles area and from their total California intrastate operations.

There was no opportunity for the customers of any of these companies to adequately prepare to meet these issues or subsidiary included issues, and a full hearing was not had or completed otherwise upon the issues raised by such motion. Moreover, the Commission's own staff necessarily had not completed its preparation, and it offered no testimony or exhibits.[1]

---

[1](Its staff told the Commission that it should have some three months at least for its work. It actually commenced its presentation on January 15, 1958, but the motion for interim relief had, of course, then been submitted for decision. The staff's last witness

Nevertheless, the Commission entertained and granted such motion, authorizing a $15,000,000 annual increase in the charges of the four companies for their multi-message unit service solely in the Los Angeles area.

This action by the Commission deprived the appellants, and the telephone customers whom they represent in the Los Angeles area, of their properties without due process of law, and denied them equal protection of the laws, contrary to the Fourteenth Amendment.

The judgment below sustained this unconstitutional action and it should be reversed by this Court upon this appeal.

The denial of Los Angeles' and Arnebergh's Fourteenth Amendment rights is plain, but the denial of Long Beach's and Jacobson's similar rights was even more flagrant.

Los Angeles and Arnebergh at least had notice that the hearing in San Francisco on September 25th would initiate extended hearings looking ultimately to increases in Pacific's charges in the Los Angeles Extended Area for its multi-message unit service. Los Angeles is directly served in part by Pacific although also served directly in part by each of the other three companies, and Arnebergh is served directly by Pacific. Accordingly, on September 25th there was an appearance and participation by Arnebergh's deputy, and a formal appearance made on behalf of the City of Los Angeles in this proceeding for a rate increase by *Pacific* alone.

---

completed his testimony on March 4, 1958. The staff finally offered 9 exhibits, totaling some 402 pages, and the testimony of its witnesses extended over 7 hearing sessions and occupies some 463 pages of the transcript of the proceedings which followed the Commission's determination of the interim motion by its Decision No. 55936.)

Long Beach and Jacobson, however, are served directly by General, not Pacific, and they had no intimation that during the hearings on Pacific's rate increase application any proposal would be made for increases in General's own charges to them. There was no reason for them to concern themselves immediately with the hearing on Pacific's application, and accordingly they were not present at the proceedings on September 25, 26 and 27th, but upon word from Los Angeles of the "interim" motion they hastened to the October 3rd hearing, where they complained bitterly that they had not received adequate notice and vigorously objected to the procedure being followed and to the Commission's entertainment of the interim motion (Pet., pp. 22-28, and Appx., pp. 54, 58).

In the end, however, the critical proposition is that the motion for an "interim" increase was made without prior notice and was granted before full hearings had been completed: no better demonstration could be made of that proposition than appears from the Commission's insistence in its motion that in fact there was *ultimately* a full hearing, extending over twenty-six hearing days following the submission of the motion for interim relief (Com. Mo., pp. 5 and 7).

Summary of Argument.

1. The authorities cited by the appellees do not avail against this Court's decisions in *Hollis* and *Wichita* that under the Fourteenth Amendment a state administrative commission must hold a hearing, with all due process incidents including proper notice, before it can become empowered to authorize final increases in a utility corporation's charges to its customers.

2. That Fourteenth Amendment issue is ripe here: its determination was necessary to the judgment below be-

cause the appellants are foreclosed under California law from urging it otherwise before the state courts or again before the state commission in any other proceeding.

3. A state administrative commission does not "represent" those who urge their interests before it, so that it can determine those interests without according notice and a full hearing in derogation of the Fourteenth Amendment.

4. The Commission's reception of the appellants' arguments that it should not entertain the motion for interim relief, and that it had no power to grant it, was not the hearing required by the Fourteenth Amendment, and the appellants' submission of those arguments waived no constitutional claims.

5. By state action and under state law, the increases authorized by the Commission's interim order had to be paid by the appellants and the other affected customers for whom they speak here. The increases so paid by the customers cannot be recovered by them outside of the proceeding brought here on appeal: by the Commission's Decision No. 56109 they are now required to be refunded only upon this Court's determination that the Commission's Decision No. 55936 must fall for its disobedience to the Fourteenth Amendment. Thus the appeal is not moot.

6. And finally, the appellants have standing to press the Fourteenth Amendment violations in their own behalf and for others: in any other event the case is within the principles of *Barrows v. Jackson* (1952), 346 U. S. 249, so that there is need for this Court to protect the fundamental rights of those the appellants represent, who could not by any conception speak effectively in their own behalf.

ARGUMENT.

POINT I.

Contrary to the Contentions of the Appellees in Their Motions to Dismiss, Customers of Regulated Public Utilities Have Rights as Such Which Are Protected by the Constitution of the United States. The Fourteenth Amendment Forbids Authorization by a State Administrative Regulatory Commission of a Final Increase by a Public Utility Corporation in Its Charges to Its Customers Until After a Full Due Process Hearing Has Been Conducted by the Commission.

The appellee Commission categorically asserts under Point II of its motion (pp. 11-14), and the appellee companies similarly assert under Point IV of their motion (pp. 19-25), that public utility customers have no constitutional rights as such under the Constitution of the United States and that specifically they are not entitled to any hearing whatever before a state commission authorizes final increases in the utility's charges to them.

This Court's decisions are directly to the contrary in *Hollis v. Kutz* (1921), 255 U. S. 452, 65 L. ed. 727, 41 S. Ct. 371, and in *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922), 260 U. S. 48, 67 L. ed. 124, 43 S. Ct. 51, and it does not appear that this Court has ever distinguished or overruled its holdings in those decisions.

This Court's decision in *Hollis*, speaking through Mr. Justice Holmes, is determinative also of several of the appellees' dilatory pleas, as will be shown hereafter, but on the main question it completely disposes of the appellees' contentions that customers of a regulated public utility have no constitutional standing.

In *Hollis* the plaintiffs were private customers of the Washington (D. C.) Gas Light Company. Under orders of the Public Utilities Commission of the District of Columbia, their charges had been increased to a level which was higher than would have been required if the United States and the District had been required to pay equivalent charges.

Accordingly, the plaintiffs sought the annulment of the Commission's order under the due process provisions of the Fifth Amendment. Aside from procedural quibbles, which this Court rejected, it was urged in reply that the plaintiffs had no constitutional standing and that in any event they could not urge unlawful discrimination as against the government itself.

On the merits this Court held on the second issue that the United States had lawfully made it a condition of allowing the establishment of the gas works that its needs and the needs of the District should be satisfied at such prices as it might fix, and that the plaintiffs, therefore, could not complain of any unlawful discrimination. But on the question of constitutional standings this Court said:

> "We do not wish to belittle the claim of a taker of what for the time has become pretty nearly a necessity to equal treatment while gas is furnished the public."

And in *Wichita (Wichita Railroad & Light Co. v. Public Utilities Commission* (1922), 260 U. S. 48, 67 L. ed. 124, 43 S. Ct. 51) there were directly presented the plaintiff's Fourteenth Amendment due process and equal protection claims against a rate increase order by a state regulatory commission (260 U. S. 52, 54, 55, 58 and 59, 67 L. ed. 127-130).

In *Wichita* there had been a hearing but the Commission had entered no finding that the existing rates were unjust, unreasonable, unjustly discriminatory or unduly preferential. The plaintiff customer's action to enjoin the effectuation of the Commission's order in the United States District Court rested not only upon diversity, and violation of the contract clause, but upon the Fourteenth Amendment violations as well. The District Court had entered judgment for the plaintiff on the pleadings, but the Circuit Court of Appeals had reversed that decree and directed a dismissal of the bill.

This Court reversed the Circuit Court of Appeals and affirmed the judgment of the District Court.

This Court said, speaking through Mr. Chief Justice Taft:

> "The charge that the order made a classification denying due process and the equal protection of the law was a mixed question of law and fact, upon which the complainant had a right to be heard. Neither court passed on it. For this reason, if there was nothing else, the decree of the circuit court of appeals would have to be reversed. . . .
>
> "There still remain for our consideration the questions upon which the courts below differed. (260 US 55).
>
> "* * *
>
> "The supreme court of Kansas, in applying the statute, recognizes that a contract for rates with a public utility cannot be abrogated except after a finding by the Commission that they are unreasonable. . . . (260 US 57).
>
> "The proceeding we are considering is governed by §13. That is the general section of the Act com-

prehensively describing the duty of the Commission, vesting it with power to fix and order substituted new rates for existing rates.[2] The power is expressly made to depend upon the condition that, after full hearing and investigation, the Commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory, or unduly preferential. We conclude that a valid order of the Commission under the act must contain a finding of fact *after hearing and investigation*, upon which the order is founded, and that, for lack of such a finding, the order in this case was void.

"This conclusion accords with the construction put upon similar statutes in other states. (Cases cited.) *Moreover, it accords with general principles of constitutional government.* The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative (260 US 58) boards to apply to the myriad details of rate schedules the regulatory police power of the state. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith, to give validity to its action. When, therefore, such an administrative agency is required, as a condition precedent to an order, to make a finding

---

[2](Cf. Cal. Public Utilities Code Section 728 (Juris. St., Appendix (G), p. 72).)

of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective." (260 U. S. 59; emphasis supplied throughout.)

And subsequently, in speaking of its *Wichita* decision in *Mahler v. Eby* (1924), 264 U. S. 32, 44, 68 L. ed. 549, 554, 44 S. Ct. 283, this Court said that in *Wichita* it had put its conclusion "not only on the language of the statute but also on general principles of constitutional government."

There is no question about it under this Court's *Hollis* and *Wichita* decisions: the Fourteenth Amendment forbids authorization by a state administrative commission of final increases in charges to public utility customers until after the completion of a full hearing with all of the established incidents of due process, including proper notice.

Without any real analysis of that proposition, the appellees deny it, but their citations do not help them.

The Authorities They Cite Do Not Support the Appellees' Contention That the Fourteenth Amendment Has No Force.

It is important that the order by the California Commission here under attack authorized a *final* increase in the companies' charges to their customers, that it binds the customers, and that such order is not subject to collateral attack either before the Commission or in any court, but only to direct attack, in the proceeding below and upon this appeal.

Thus, the decision of this Court in *United States v. Merchants, etc., Assn.* (1916), 242 U. S. 178, 61 L. ed. 233, 37 S. Ct. 24 (Com. Mo., pp. 11, 17; Cos.' Mo., pp. 20, 21), would have no application even if it had followed, rather than preceded, this Court's decisions in *Hollis* and

in *Wichita*. For there this Court concluded that the complaining communities and shippers were not bound by the order entered in a Section 4 proceeding, and that the Act afforded them ample remedy through subsequent proceedings, under Sections 13 and 15. The cities had applied for a rehearing in the Section 4 proceeding, but this Court held that they had mistaken their remedy. The decision is applicable only to the limited matters covered by Section 4 of the Act to Regulate Commerce of 1887.

The Commission says (p. 12) that this Court has considered the essential question on a number of occasions and that it has decided it contrary to the appellants' contentions. No support is offered for that sweeping statement except *Midland Realty Co. v. Kansas City Power & Light Co.* (1937), 300 U. S. 109, 81 L. ed. 540, 57 S. Ct. 345.

But the decision in *Midland* is not pertinent. The essential fact there was that although others had sought administrative relief from the Missouri commission, and the Midland Company could have, it had not, and although others had directly attacked the commission's decision,[3] and the Midland Company could have, it had not.

Nor does this Court's decision in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.* (1956), 350 U. S. 332, 100 L. ed. 373, 76 S. Ct. 373, in any way limit the scope or the effect of the decision in *Wichita* as the Commission and the companies suggest at pages 12 and 24 of their respective motions.

---

[3]*State ex Rel. Case v. Public Serv. Commission* (1923), 298 Mo. 303, 249 S. W. 955, and see the decision below, *Kansas City Power & Light Co. v. Midland Realty Co.* (1936), 338 Mo. 1141, 93 S. W. 2d 954.

In *United* the plaintiff did not attack on constitutional grounds the provision of the Natural Gas Act that industrial rates should go into effect automatically, without suspension, and without any hearing by the Commission. The sole question before this Court was one of statutory interpretation, and this Court found support in *Wichita* for its conclusion in *United* that under the Natural Gas Act a regulated public utility cannot unilaterally change a contract rate.

Ignoring Section 728 of the Public Utilities Code, the Commission further makes the assertion (Com. Mo., pp. 13-14) that the California statutory requirement for a "showing" and for a finding is unusual. This assertion is made without stated support and it is believed to be inaccurate, but the question here is not whether the statutes of California or other states do require full due process hearings, but rather that the Fourteenth Amendment requires that an administrative state commission conduct a full hearing before it can become empowered to authorize final increases in utility charges.

A more detailed examination of such contentions when the time comes for briefs on the merits might be appropriate if the question were novel. But the question is not novel and it has been settled adversely to the appellees in the *Hollis* and *Wichita* decisions of this Court.

The Commission also suggests that under various federal regulatory statutes increased charges may become effective without a hearing if the regulatory commission fails to suspend them. The Commission cites no decision by this Court that an affected customer is without protection under the Fifth Amendment in such a case. Even if this Court were to hold that the administrative establishment and regulation of a monopolistic activity under

Congressional authority creates no right in customers to a due process hearing under the Fifth Amendment before the administrative commission can authorize increased charges, it would not follow that this Court's *Wichita* decision no longer establishes Fourteenth Amendment protection against arbitrary administrative state action. There would be grounds for distinction in such an event, but it is unnecessary to explore them here since no such decision appears.

In any event, it would presumably be the application of the federal statutes that would be called in question, rather than the statutes themselves, and no such question could arise except where the federal commission failed to suspend a proposed schedule and to proceed to a hearing on it.

For instance, the City of Los Angeles has itself on several occasions asked the Federal Power Commission to suspend natural gas rates under Section 4(e) of the Natural Gas Act. In each such instance the schedule in question has been suspended and a full hearing has followed. Where the schedule has become temporarily effective after such suspension, pending the Commission's final decision, the increases so effected have, of course, been subject to refund, and upon such facts there would appear to be little basis for any subsequent complaint that the Fifth Amendment had been ignored.

Here again the fact that constitutional violations have not been brought to this Court's attention would seem to demonstrate general administrative compliance with constitutional requirements, as there generally was compliance by the California Commission prior to the proceeding involved in this appeal.

Carlsen v. United States (1952), 107 Fed. Supp. 398 (cited by the Commission at p. 14) merely holds that the exercise of its discretion by the Interstate Commerce Commission in refusing to suspend the effectiveness of filed transportation rates is not reviewable by the courts. No constitutional questions were considered, and it is familiar doctrine that the judicial department has very limited power to revise statutory provisions.

In their footnotes on pages 21-23 the companies cite several state court decisions to support their contentions that public utility customers have no protection under the Fourteenth Amendment, and on page 22 they state that such is the effect of *United States Light & Heat Corp. v. Niagara Falls Gas & Electric Co.* (1931), 47 F. 2d 567.

The decisions so construed by the companies to deny rights under the Fourteenth Amendment to public utility customers are for the most part not apposite and otherwise they are neither controlling or persuasive, since they cannot be reconciled with this Court's decision in *Wichita.*

With the exception of *State v. Mountain States Tel. & Tel. Co.* (1950), 54 N. M. 315, 224 P. 2d 155, an analysis of each of these decisions is in the record (Appx. to Pltf. Reply to the Answ. in S. F. No. 19900), and since the direction of this brief to the merits is appropriate only as it is compelled by the enlargements of the appellees' motions, that analysis will not be duplicated here.

From the *United States Light & Heat* decision it appears not only that the suit was collusive but that the plaintiff had not complained "under the several provisions of the (New York) Public Service Law" of the rates which it asked the District Court to enjoin. Apparently the Circuit Court of Appeals fully recognized the customer's right to a full hearing, for it said:

> "If there be an exercise of arbitrary power against the consumer and wrongful enforcement by the commission of the Public Service law, a remedy is afforded under the provisions referred to for the consumer to lodge his complaint, obtain a hearing and redress." (47 F. 2d 570.)

As will be shown hereafter there are no such administrative remedies available under California law.

Of the other decisions so cited by the companies only one is precisely inconsistent with this Court's decision in *Wichita,* which it preceded: *Bartlesville v. Corporation Commission* (1921), 82 Okla. 160, 199 Pac. 396. *Consumers' Gas Co. v. Corporation Commission* (1923), 95 Okla. 57, 218 Pac. 126, followed and cited the *Bartlesville* decision, but there the complaining cities had participated in the hearing before the Commission without objection to the sufficiency of the notice and without any suggestion that they were not prepared to proceed. The Oklahoma Supreme Court simply held that this constituted a waiver of notice if any was required.

Some of the other decisions cited by the companies contain dicta which out of context would seem to support the companies' assertion that the Fourteenth Amendment does not extend to public utility customers, but otherwise they do not at all support that contention.[4]

---

[4]*Boston Real Estate Board v. Department of Public Utilities* (1956), 334 Mass. 477, 136 N. E. 2d 243, and *Gateway City Transfer Co. v. Public Service Commission* (1944), 245 Wis. 304, 14 N. W. 2d 6, have no application to the facts here. *Gateway* did not involve customers' charges at all, and *Boston* involved no due process hearing question. *City of New Haven v. New Haven Water Co.* (1946), 132 Conn. 496, 45 A. 2d 831, presented only the question of the authority of a state to supersede charges exceeding those provided under a municipal contract. (*Cf., Los Angeles Railway Corp. v. Railroad Commission and the City of Los Angeles* (1929), 280 U. S. 145, 74 L. ed. 234, 50 S. Ct. 71.) In *Ten*

The other decision cited by the companies, on page 22, is *State v. Mountain States Tel. & Tel. Co.* (1950), 54 N. M. 315, 224 Pac. 155. The case was before the New Mexico Supreme Court on appeal from an order by the Corporation Commission increasing telephone charges, and it was held that the Supreme Court did not have jurisdiction to set aside a rate made by the Commission *after a full hearing on prior notice.* The decision basically rests on the idea that the courts cannot make rates, but it should be noted that the Court also said that "Rates fixed or ap-

---

Ten Lincoln Place v. Consolidated Edison Co. (1947), 190 Misc. 174, 73 N. Y. S. 2d 2, aff'd 273 App. Div. 903, 77 N. Y. S. 2d 168; *Childs v. Brooklyn Edison Co. of New York* (1951), 105 N. Y. S. 2d 503, and *McCormick v. Westchester Lighting Co.* (1931), 141 Misc. 261, 252 N. Y. S. 454, it was held merely that the plaintiff's recourse was first to the commission. (The appellants have never contended that the Fourteenth Amendment requires that public utility customers be heard first, or *de novo,* by the courts.) In *Lenihan v. Tri-State Telephone & Telegraph Co.* (1940), 208 Minn. 172, 293 N. W. 601, and in *City of Birmingham v. Southern Bell Tel. & Tel. Co.* (1937), 234 Ala. 526, 176 So. 301, there had been a full hearing before the commission prior to its rate increase order. *Lenihan* held only that a settlement of pending litigation bound the parties and *Birmingham* only that public utility customers have no right under the Constitution to a judicial trial *de novo* after they have been fully heard by the Commission. In *State v. Municipal Corporations of Scotland Neck* (1955), 243 N. C. 193, 90 S. E. 2d 519, there had been a full hearing before the Commission and a trial *de novo* in the Superior Court and in *City of Atlanta v. Ga. Ry. & Power Co.* (1919), 149 Ga. 411, 100 S. E. 442, there had been a full hearing before the Commission in which the City had participated, and under Georgia law there could be a judicial trial *de novo.* Any observations on constitutional questions in these decisions are pure dicta and such is the case also in *State v. Rawlings* (1951), 229 Ind. 552, 99 N. E. 2d 597, and in *Union Dry Goods Co. v. Ga. Public Service Corp.* (1916), 145 Ga. 658, 89 S. E. 779, since it appears from *Rawlings* that Indiana customers are entitled to a hearing if they object to proposed increased charges, and in *Union* it does not appear that there had not been a hearing. Moreover, none of the decisions cited by the Indiana Court support its dicta in *Rawlings* interpreting the Constitution, and the decision in *Union* preceded this Court's *Wichita* decision.

(All of these decisions were considered at greater length in the appellants' reply to the answers below. Such reply is part of the record here.)

proved by the commission without a hearing are void (224 P. 2d 166-167)."

The companies next contend that the appellants have other remedies under California law, and that consequently their constitutional claims are not ripe here. This contention is not sound. It is significant that the Commission makes no such assertion here, and that it made none such below, and consequently the judgment below cannot be construed against the appellants on any such state ground.

POINT II.

After the California Public Utilities Commission Has Made a Finding of Reasonableness and Has Authorized Increases in a Utility's Charges, the Affected Customers May Not Bring Any Collateral Attack in the California Courts, nor May They Question Such Increases in a Reparation Proceeding Before the Commission. The Customers' Sole Remedy for Fourteenth Amendment Violations Preceding Such a Commission Order Is in a Review Proceeding, Following the Commission's Refusal to Rehear Its Order, or on Appeal to This Court From the Judgment Therein, as Here.

Section 1731 of the California Public Utilities Code provides:

> ". . . No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has made, before the effective date of the order or decision, application to the commission for a rehearing."

Section 1732 provides:

> "The application for a rehearing shall set forth specifically the ground or grounds upon which the

applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application."

Section 1735 provides:

"An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission by order directs."

Section 1756 provides:

"Within 30 days after the application for a rehearing is denied . . . the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision . . . inquired into and determined. . . ."

Section 1757 provides:

"No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this Article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination."

Section 1758 provides:

> "The Commission and each party to the action or proceeding before the commission may appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. . . ."

Section 1759 provides:

> "No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof. . . ."

Section 1760 provides:

> "In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."

Nor is there any remedy under California law by collateral attack before the Commission itself:

Section 734 of the Public Utilities Code provides:

> ". . . No order for the payment of reparation upon the ground of unreasonableness shall be made by the commission in any instance wherein the rate in question has, by formal finding, been declared by the commission to be reasonable. . . ."

And Section 1709 provides:

> "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

Moreover, if the question were open, *Smith v. Illinois Bell Telephone Co.* (1926), 270 U. S. 587, 70 L. ed. 747, 46 S. Ct. 408, would be pertinent. There the appellants urged that the company should have instituted another and distinct proceeding, but this Court said that to require this would be to put aside substance for needless ceremony. And in *Hollis v. Kutz, supra* (1921), 255 U. S. 452, 65 L. ed. 727, 41 S. Ct. 371, this Court saw no sense in a construction which would require a new complaint asking a commission to review a decision just reached by it, particularly where the issue is a constitutional one.

Thus the appellants' Fourteenth Amendment rights have been established by this Court's decisions. California impaired those rights by the Commission's Decision No. 55936, the California Supreme Court failed to set aside such unconstitutional state action, and the issue is ripe for decision here.

If the Commission and the companies actually believe that the procedure followed by them was proper, then it would appear they, too, should seek a hearing on the merits, so that this Court could expressly overrule the *Hollis* and *Wichita* cases, as would be necessary were such procedure to be sustained.

Unfortunately, the appellees seek instead to avoid a determination on the merits by specious and dilatory pleas. The remainder of this argument will consider those pleas, although they are largely answered by the facts shown in the enlarged statement herein of the proceedings before the appellee Commission.

POINT III.

Although the Commission Has Governmental Powers, to Be Exercised Like All Such Powers to Promote the Public Welfare, It Does Not on Such Account "Represent the Public" so That Its Powers Can Be Exerted Without Restriction by the Fourteenth Amendment.

The appellees' contention that California public utility customers have no constitutional rights are tempered by the assertion that the customers' interests are represented by the Commission itself, and they cite a number of decisions in which it is observed that the administrative commission must exercise its powers to protect the rights of the public, or that the Commission represents the public interest, and so forth.

This argument is obviously specious. All governmental departments and agencies are established for the promotion of the public welfare, and it could as well be urged that one has no right to a trial or hearing before any court, or before other officers or boards exercising quasi-judicial powers.

The very genius of the due process conception is that men are fallible, that no matter can be known until it has been heard, and that conflicting interests and claims can only be reconciled or determined upon their full assertion.

None of the decisions cited by the appellees in this connection involved facts like those here.

It has been noted that the decision in *United States v. Merchants, etc., Assn.* (1916), 242 U. S. 178, 61 L. ed. 233, 37 S. Ct. 24, is applicable only to proceedings like those involved there.

In *Smith v. Illinois Bell Telephone Co.* (1926), 270 U. S. 587, 70 L. ed. 747, 44 S. Ct. 408, the company had secured an order from the United States District Court enjoining the Illinois commisison from enforcing a certain schedule of telephone rates. There was no conflict between the commission's decision and the assertions on the subscribers' behalf, and it was held only that there had been no need to bring the subscribers before the trial court.

In *City of New York v. New York Telephone Co.* (1923), 261 U. S. 312, 67 L. ed. 673, 43 S. Ct. 372, the appeal was from the United States District Court's denial of a motion by the City of New York to be a party defendant. There was no difference between the claims of the New York commission and those of the city, and the record showed that they were cooperating fully in the defense. It was held only that under such circumstances the District Court's order involved no abuse of discretion.

Nor is there any similarity between the facts here and the facts in the California cases cited by the companies.

Sale v. Railroad Commission (1940), 15 Cal. 2d 612, 104 P. 2d 38, involved a certificate of public convenience and necessity, not rates, and it was held only that nothing prevents a regulatory commission from proceeding *ex parte* in a certificate proceeding. (*Cf., Gateway City Transfer Co. v. Public Service Commission* (1944), 245 Wisc. 304, 14 N. W. 2d 6, cited by the companies at p. 21.)

Neither did *Hanlon v. Eshleman* (1915), 169 Cal. 200, 146 Pac. 656, involve charges to customers.

And *Pacific Telephone & Telegraph Company v. Eshleman* (1913), 166 Cal. 640, 137 Pac. 1119, involved only a commission order requiring the connection of Pacific's long distance lines with the local lines of two independent companies. There was no question as to notice or hearing: the case turned upon the issue of Pacific's entitlement to compensation in advance before it could be required to devote its properties to a use for which they had not been dedicated.

POINT IV.

The Appellants' Opposition to the Interim Motion Did Not Waive Any Constitutional Claims for Them or for Others, and the Denial of Due Process Is Established in the Record.

The Commission and the companies first assert that the individual appellants, Arnebergh and Jacobson, are bound by the Commission's proceedings to the time the motion for "interim" relief was submitted on October 10, 1957, and thus by Decision No. 56652 affirming the "interim" order, Decision No. 55936, because they had appeared in those proceedings through their deputies as counsel for the appellant cities and in the next breath they assert that Arnebergh and Jacobson have no standing here because they did not formally appear individually in those same proceedings.

The fact is that right up to the submission of the "interim" motion the appellants vigorously urged the Commission's lack of jurisdiction to entertain it or to grant it. This is clearly shown in the record, and it is the sheerest

sophistry to contend that there was any waiver in the submission of such objections or that a due process hearing was accorded merely because the Commission listened to arguments that it had no jurisdiction to proceed.[5]

To contradict this record, the Commission and the companies rely chiefly on the Commission's self-serving statements in its Decision No. 56048 (Juris. St., Appx. (E), pp. 57-63, esp. pp. 61-62):

> "No suggestion or request was made by any of these parties for a continuance to enable said parties to present evidence. Also, the motion for interim rate relief was argued by the parties, including the City of Los Angeles and other protesting and interested parties. In these circumstances, the repeated insinuation of petitioners that the interested parties were denied an opportunity to be heard and that a full hearing was not had on the motion for interim relief is disingenuous, to say the very least."

The language of this Court in *Morgan v. United States* (1936), 298 U. S. 468, 80 L. ed. 1288, 56 S. Ct. 906 at 477, is applicable here:

> "These suits for the review of the administrative action were thus directly authorized and appeal lies.

---

[5]Even the Commission's abbreviated statement of the cities' positions in its interim decision, No. 55936 (Juris. St., Appx. (B), pp. 11-12), makes it clear that there was no waiver, and it also clearly appears from that decision that no prior notice of the "motion for interim relief" had been given (*id.*, p. 6) and that the hearing had not been completed when the motion was taken under consideration for decision (*id.*, pp. 3-7, 16-18). This is all more fully shown elsewhere in the record (Pet., pp. 1-15, 18-29, 35-42, 46-47, and 53-55, in the Appx. thereto at pp. 1-5, 9-11, 14-16, 21-36, 31-54, and in App. Reply to Answ. Below, at pp. 2-5, 8, 40-42, and 52-53). Moreover, the appellants' essential allegations in their petition to the California Supreme Court were fully supported by references therein to the transcript of the proceedings before the Commission (Pet., pp. 20-27), and that petition was verified.

> . . . All questions touching the regularity and validity of the proceeding before the Secretary are open to review. . . . When the Secretary acts within the authority conferred by the statute, his findings of fact are conclusive. . . . But, in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise the statutory conditions could be set at naught by mere assertion. If, upon the facts alleged, the 'full hearing' required by the statute was not given, plaintiffs were entitled to prove the facts and have the Secretary's order set aside."

At pages 16 to 19 the companies say that the appellants have not supported their "naked assertions" as to lack of due notice and hearing by bringing up the record before the Commission, citing *Mississippi Valley Barge Line Co. v. United States* (1934), 292 U. S. 282, 78 L. ed. 1260, 54 S. Ct. 692; *Edward Hines Yellow Pine Trustees' v. United States* (1923), 263 U. S. 143, 68 L. ed. 216, 44 S. Ct. 72; and *Nashville, Chattanooga, & St. Louis Railway v. Tennessee* (1923), 262 U. S. 318, 67 L. ed. 999, 43 S. Ct. 583.

Those decisions do not require an appellant in such a case as this to bring up anything but the record which was before the court below: the appellants have done that, and could not have done more. Each of those decisions was on an appeal from a decree of a United States District Court in an action which had been brought to review orders made by the Interstate Commerce Commission, and this Court held that the complainants should have brought in necessary parts of the record to support the attack made by them upon the Commission's order.

This is not such a case: this appeal tests the judgment of the California Supreme Court which sustained the application of the Commission's Decision No. 55936 so as to deprive these appellants of their properties without due process of law, and so as to deny them the equal protection of the laws. The Court below refused to bring up the record before the Commission, and the record here could in no way have been enlarged so as to include the Commission's record.

The issue here is one of constitutional rights, to be determined upon the record which was before the Court below when it refused to recognize those rights.

Nor is there any expression in *United States v. Miller* (1943), 317 U. S. 369, 87 L. ed. 336, 68 S. Ct. 276; *Doty v. Love* (1935), 295 U. S. 64, 79 L. ed. 1303, 55 S. Ct. 558; or *Detroit, Fort Wayne & Belle Isle Railway v. Osborn* (1903), 189 U. S. 383, 47 L. ed. 860, 23 S. Ct. 540, which supports any excuse by the Commission of its failure to require proper notice of the motion for "interim" relief. The companies cite those decisions at page 19 to support their contention that the appellants' participation in the argument on the interim motion waived all objections that proper notice of the motion had not been given. In *Miller* the respondents had been fully protected throughout and their only complaint was that the District Court had not given them advance notice of the particulars of its judgment. In *Doty* it was held only that after the appellant had appeared and been fully heard on the merits they could not complain that they had originally had insufficient notice, and in *Detroit* the court rejected the company's complaint that the statute did not require notice, since notice had in fact been given and the company had been fully heard.

There was no claim in any of these cases that there had not been a full opportunity to prepare to meet the factual issues, and the decisions have no application to this case, where the basic vice was not only that there was no prior notice of the motion, and no opportunity to prepare, but that the issues were not fully explored before the Commission determined them by its interim decision, No. 55936.

There is some parallel here with the *Wichita* facts as they are reported below in *Public Utilities Commission v. Wichita Railroad & Light Co.* (1920), 268 Fed. 37. There the plaintiff customer had objected to the Commission's jurisdiction in the proceeding before the Commission on the utility company's application for authority to increase its charges. The Commission had overruled that objection, which urged the customer's contract, but the Commission's order of authorization was finally restrained under this Court's decision on appeal upon grounds which arose after the customer's first appearance.

POINT V.

The Appellees' Other Dilatory Pleas Are Without Merit.

A. The Appeal Is Not Moot.

The appellants and the affected customers whom they represent have had to pay increases in telephone charges at the rate of $1,250,000 a month, under the compulsion of the Commission's interim decision, No. 55936. Those increases are refundable only according to the Commission's Decision No. 56109, if "Decision No. 55936 be annulled by the Supreme Court of California or any other court of competent jurisdiction." Thus, if this

appeal were to be dismissed, the increases paid would not be refunded and could not otherwise be recovered, but following this court's reversal of the judgment below, they would be refunded.

Under these circumstances, the claim that the appeal is moot necessarily involves some nimble shuttling. Basically it rests on the idea that the Commission's later decision, No. 56652, affirmed and ratified the interim decision.

The appellees' arguments are not stated overtly but they seem to say:

(1) The earlier decision, entered without the required notice and due process hearing, has become merged in the later decision, and is reviewable only upon the whole record, or

(2) Decision No. 56652 was entered after a full hearing. Upon an extensive record the Commission then determined that its conclusions upon the incomplete record had been correct. Since that later decision is final, it gives unimpeachable validity to the earlier decision involved in this appeal.

If the appellees' argument rests upon the first theory, it misleads. As the appellants showed in the Jurisdictional Statement (pp. 3, 11), they anticipated such a procedural trap by filing with the California Supreme Court a petition to review Decision No. 56652, as it ratified and affirmed Decision No. 55936. Both the Commission and the companies pleaded as *res judicata* the judgment of May 21, 1958, from which this appeal is taken, and the California Supreme Court thereafter denied that petition under SF No. 20007. The appellees cannot now reverse their position by claiming that the

constitutional issue did not become ripe for review on this appeal upon the entry of the judgment below, on May 21, 1958.

The alternative argument is just as specious, and it comports neither with sound philosophy nor with human nature.

A party is entitled to adequate notice and a fair hearing, without regard to the eventual determination of the case, or the Fourteenth Amendment is without real meaning. To say in advance that his claims should be rejected, and that therefore he need not be heard, is to beg the question and to propose the nullification of the whole doctrine of Fourteenth Amendment due process, including its prohibition of *ex post facto* state action.

On the other hand, only the most naive would rely upon eventual fair treatment by supposing that a summary decision will be reversed by him who made it after he has finally heard the whole story. It is not a praiseworthy attribute, but it is nevertheless human, that one holds to a decision once made and strives to rationalize it rather than to confess error. And this is all the more true where the confession would not only demonstrate original error, but would establish the fact that irreparable damage had been done under it.

If the Commission had recognized in the final order after the full hearing that it had been unsound and unfair to require the Los Angeles Extended Area[6] ratepayers to pay such increases that Pacific's rate of return from its exchange operations in that area was raised from 7.01% to 8.29%, the charges in other areas would earn

---

[6]As described in footnote No. 4, on page 9 of the Jurisdictional Statement.

at a rate as low as 2.68% (as evidence showed), it would have recognized the unfairness of the interim order which effected that result. Consequently, it would have determined in its final order that the interim order had been ill-advised, and it would have adjusted the rates it authorized in the Los Angeles area to effect a less discriminatory result.

But in such a case the Commission would itself have established the fact that the payment of the increased charges by the Los Angeles subscribers in the meantime had unfairly deprived them of some five million dollars, and the Commission would have been without power to correct that result, for there was no provision for any refunds in the event that its own final order should disaffirm its interim order.

The Commission could have escaped being confronted with such a dilemma by granting the appellants' petitions for a rehearing of the interim order, but it chose not to do so and it denied those petitions on January 7, 1958 (Juris. State., Appx. C, D, E, F, pp. 25-66).

Any realist, then, would say, as of January 8, 1958, that the chance was infinitesimal that the Commission would not finally affirm its interim decision, no matter what the evidence might be.

The proposal that a final decision by a state administrative board can cure the effect of an earlier order, *ex post facto*, in denial of due process rights, proposes *carte blanche* authority to substitute mere form for the substance of the Fourteenth Amendment.

None of the decisions cited by the appellees in this connection is pertinent. They involve cases where the final judgment in an injunction proceeding rendered moot a separate appeal from a consistent interlocutory order.

But in *Prendergast v. New York Tel. Co.* (1923), 262 U. S. 43, 67 L. ed. 853, 43 S. Ct. 466, a somewhat similar contention by a telephone company, in reverse, was rejected by this Court. There the New York Commission had temporarily reduced the company's rates and the company had secured an interlocutory order from the United States District Court enjoining enforcement of the reduction order, under a $6,000,000 bond to secure the repayment of all excess charges paid in the event the injunction should be dissolved. Thereafter the company moved to affirm the interlocutory injunction on the ground that the Commission had later established a schedule of rates which would yield a higher return than the enjoined temporary rates. The company claimed that this showed that the District Court's injunction was properly granted. This Court held, however, that the Commission's later order, upon evidence not before the Court, did not establish that the injunction was rightly granted under the conditions which then existed, and it denied the company's motion.

B. The Appellants Were All Plaintiffs Below and Are Parties of Record Here, With Standing in Themselves, and in Representative Capacities, to Urge the Fourteenth Amendment Violations.

The appellees urge that the appellant cities can urge no federal claims under this Court's decisions, that the appellants Arnebergh and Jacobson cannot be deemed to have been proper parties below, or to be parties here, and that consequently none of the appellants can urge the Fourteenth Amendment violations in behalf of other affected subscribers.

These contentions are unsound and as will be shown under Point VI, such pleas go to this Court's discretion

rather than to its jurisdiction, and should be brushed aside so that the Court can reach the basic question and thus protect the fundamental rights of the other affected subscribers, who could not practicably have personally urged their claims below.

The three phases of the appellees' pleas on standing will be considered separately.

1. THE APPELLANT CITIES HAVE STANDING IN THEIR OWN BEHALF.

On page 7 the companies cite eight decisions by this Court to support the assertion that state power may be exerted against cities without any hindrance at all by the Constitution of the United States. Three of those decisions are similarly cited by the Commission also, at page 15, with *Pederson v. Portland* (1933), 144 Ore. 437, 24 P. 2d 1031. In several instances these decisions are more narrow than the appellees suggest, holding only that a state legislature may supersede a municipal contract in the exercise of the police power, and in only a few was there necessarily any consideration of the distinction between a city's rights or privileges as a governmental entity and its rights and privileges in behalf of its residents and taxpayers, as the custodian of their property interests in its proprietary establishments.

Moreover, Los Angeles and Long Beach are home rule chartered cities: essentially they derive their powers directly from the people of California through the Constitution (Art. XI, Secs. 8, 8½, 11, 12, 13, 19) rather than from the State Legislature, and there seems to have been no occasion, either in *Railroad Commission v. Los Angeles Railway Corp* (1929), 280 U. S. 145, 74 L. ed. 234, 50 S. Ct. 71, or elsewhere, for determination of the

effect of the broad language of such decisions as *Williams v. Mayor* (1933), 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431, to situations where that basic distinction is presented.

These considerations are all in the record, as being within the judicial knowledge of the Court below, as is the proposition that within their constitutional powers (Cal. Const., Art. XI, Sec. 19) the appellant cities own and operate water, electric power, gas, harbor and airports departments in their proprietary capacities. Thus, of the some $1,250,000 in telephone charges incurred annually by the City of Los Angeles, about $450,000 is incurred by its proprietary departments.

It is submitted that if this appeal were to be dismissed upon the appellees' objections to the cities' standing, the unhappy results would inferentially include the determination by this Court of very difficult questions, previously undecided, which are raised by these two considerations.

When it becomes necessary to determine these questions, the appellant cities are convinced that it should be decided that the general language of decisions like *Williams* has no application to the appellant cities or to arbitrary state action which would divest a city's taxpayers of enormously valuable enterprises which have been constructed by them without fear that they might be snatched away contrary to general constitutional principles and to the detriment, not only to the City, but also to the creditors and bond holders, who certainly are protected by the Constitution. But this Court need not reach these difficult questions here for a decision on the due process question presented. The individual appellants clearly have standing, and the appellees' doubts of the

appellants' representative standing are without foundation.

Here, as elsewhere in this brief, the appellants are aware of observations by this Court that its refusal to hear a case on the merits does not imply its approval of the judgment, much less its endorsement of every contention advanced by the appellees or respondents. Nevertheless, the importance of the questions here presented must be weighed with full recognition that the dismissal of this appeal would in the fields of public law and public utility regulation have, for practical purposes, the effect of a decision for the appellees on the merits, without the limitations on that effect which would follow from an opinion by this Court upon affirmance.

2. The Individual Appellants.

The record clearly shows that the appellant Arnebergh is a subscriber of the Pacific Company within the Los Angeles Extended Area, that the appellant Jacobson is a subscriber of the General Company within that area, that the increases in the four companies' charges under the Commission's interim decision adversly affected them both, as they did practically every other subscriber of the four companies within that area, and that the total of the increases to the subscribers in that area was $15,000,000 annually [Juris. State., Appx. C and D, pp. 25, 48; Rec., Pet. pp. 9-11]. Moreover, Arnebergh and Jacobson were plaintiffs below and are parties of record here.

Nevertheless, their standing is disputed, on the theory that they were not entitled to seek a rehearing from the Commission, and that only those who have standing to seek a rehearing, and who do so, have standing afterward to petition the California Supreme Court for review.

The short answers are (1) that a utility company's customers are pecuniarily interested in the company, within the meaning of Section 1731 of the California Public Utilities Code (Juris. State., Appx. G, pp. 76-77), and may therefore apply to the Commission for a rehearing of a rate increase order, and (2) that any resident of a city participating in the proceeding is already a party by the city's representation, and clearly may appear individually at any time. This latter, consistent, view, moreover, accords with the Commission's established practice.

The appellees, however, strain to exclude Arnebergh and Jacobson by contending that the question is one for the state court and that it was there decided adversely to the appellants.

It it were assumed that such contention could be technically supported, such construction of the statute would be denied recognition for its variance with the Constitution.

Otherwise, this would be the case in California:

(1) The Commission could grant a rate increase without notice or hearing, and without making any investigation or considering any evidence. It could even do this on its own motion. Such grant could increase the utility's charges to the customers' utmost capacities to pay, without any limitation according to the company's costs or earnings requirements, and it could effect discriminations without limit among customers, areas, localities and classes of service.

(2) Such action could be taken in secret, and knowledge of it by the public could be gotten only after its placement in the Commission's records. Moreover, such

an order could be made effective immediately, and thus obligate customers before they knew of the increase (Cal. Pub. Util. Code, Secs. 1705, 1709; Juris. State., Appx. G, pp. 75-76).

(3) No one in such a case could ask for a rehearing, since no one had been a party to the proceeding, and if the order were made effective immediately under Section 1705, the provisions of Sections 1731, 1756 and 1759 of the Code would further bar any petition for rehearing (Juris. State., Appx. G, pp. 76-78. See *Clemmons v. Railroad Commission* (1916), 173 Cal. 254, 159 Pac. 713, where there was such a result.)

(4) A grant of rate increases by the Commission in such manner would then be entirely beyond reach by any customers, under the provisions of Sections 734, 1709, 1731, 1756 and 1759 of the Code (Juris. State., Appx. G, pp. 73, 76-78).

By such a process, according to the appellees' contentions, the most arbitrary administrative action imaginable could be placed by state law entirely beyond the reach of any action before the courts. Such a construction does not accord with general constitutional principles, or with the Fourteenth Amendment.

3. The Appellants as Customer Representatives.

As this Court knows, a proceeding before an administrative commission on issues involving utility charges is difficult and complicated to a degree which is increased almost geometrically according to the utility company's size, the number of its customers, and the ramifications of its operations. The utility's resources to present its case are practically unlimited, particularly since its expenses in regulatory proceedings are ordinarily fully rec-

ognized as costs to be assessed against and paid by its customers, even by rate increases when such costs result in reducing the company's earnings below a level found to be workable.

If there is to be any effective examination of the utility's case, then accounting, engineering and legal talent must be available for that purpose in some reasonable proportion. Consequently there must normally be heavy reliance on the Commission's staff by customer appearances, and it should be here remembered that the Commission received no evidence from its staff before the submission of the interim motion involved here. In any event, any effective inquiry, either to complement the staff's work, or to explore conflicting customer interests, usually can come only from customers who have very heavy stakes.

Under these circumstances it is vain to suppose that individual customers can or will appear before a commission and effectively speak for their interest, or to suppose that any other spokesmen than cities and other political entities, *parens patriae,* will come forth in their behalf.[7]

Recognizing these realities, no doubt, the Court of Appeals for the District of Columbia sustained Pittsburgh's standing in a situation which was less demanding, if anything, because the commission action Pittsburgh wished to attack would not itself immediately affect it.

---

[7]*Cf., Georgia v. Pennsylvania Railroad Co.* (1945), 324 U. S. 439, 89 L. ed. 1051, 65 S. Ct. 716, esp. at pp. 443-451, and particularly in the light of the fact that Los Angeles and Long Beach are home rule chartered cities whose existence and powers originate and directly flow from the Constitution of California, as developed in summary on pages 38-39, *supra,* under Point V, B, 1.

The decision is *City of Pittsburgh v. Federal Power Commission* (1956), 237 F. 2d 741, where Pittsburgh and others sought to annul the commission's order that the Texas Eastern Transmission Corporation might abandon a portion of the Little Inch gas pipeline and substitute another facility. In discussing Pittsburgh's standing, the Court stated (pp. 748-749):

> "The City of Pittsburgh and its residents are consumers of natural gas delivered through the Little Inch pipeline. It is conceded that Pittsburgh would be aggrieved by a reduction of supply or increase of cost of gas to the consumer. But there is nothing in this record to show that this order would immediately have such consequences and Pittsburgh does not claim that it will. What Pittsburgh claims is that the Kosciusko line can, at relatively little cost, be expanded to carry additional gas when demand increases and that, if this 'cheap expandibility' of the Kosciusko line were now to be exhausted as a replacement for the abandoned Little Inch, future expansion would require expensive construction of additional facilities, the cost of which would be reflected in increased rates to consumers.
>
> "If these claims are true, Pittsburgh has standing to challenge the order. Though rate increases would occur only in the future, there is nevertheless an immediate injury: the exhaustion of the Kosciusko line's 'cheap expandibility.' It is argued, however, that there has been no showing of the likelihood of future expansion of natural gas deliveries or of the effect of such expansion upon consumers. But Pittsburgh's standing must be taken as proven, because proof was forestalled."

POINT VI.

In Any Event the Appellees' Dilatory Pleas Go to This Court's Discretion, and Not to Its Jurisdiction. The Court Should Brush Such Quibbles Aside and Come to Grips With the Basic Question Presented on This Appeal.

If the appellees' objections to the appellants' standing seem at all tenable, the facts bring this case within *Barrows v. Jackson* (1953), 346 U. S. 249, 97 L. ed. 1586, 73 S. Ct. 1031, and the decisions cited therein, since it clearly would have been difficult, if not impossible, for the individual customers in the Los Angeles area to have themselves asserted their claims to the Commission before October 10, 1957, or at all, and for them then to have brought their claim to this Court, after such a weary pilgrimage as these appellants have had to follow.

This is here particularly true because individual customers through the Los Angeles area have in the past relied upon the representations of Los Angeles, Long Beach and other cities for the protection of their interests before the appellee Commission, and have necessarily assumed that their representation by the cities would fully protect their Fourteenth Amendment rights as well as their rights under California law.

Conclusion.

The appellants believe that the judgment below resulted in a clear violation of their Fourteenth Amendment rights and of similar rights in the other customers for whom they speak, that this federal question is clearly ripe for review here, that they have standing to urge it, and that in any event it should be determined by this Court for

the protection of fundamental rights which otherwise would fall.

Moreover, the appellants believe that the basic question presented has magnitude nationally, and that it should be determined here to assure future obedience by state administrative agencies to the Constitution of the United States.

It is, therefore, respectfully submitted that this Court's jurisdiction appears, that the question is substantial, and that the motions to dismiss should be denied.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

ALAN G. CAMPBELL,
Assistant City Attorney,

Attorneys for the Appellant,
The City of Los Angeles.

ROGER ARNEBERGH,
Appellant in Propria Persona,

WALHFRED JACOBSON,
City Attorney,

Attorney for the Appellant,
The City of Long Beach.

WALHFRED JACOBSON,
Appellant in Propria Persona,

Of Counsel:

LESLIE E. STILL,
Deputy City Attorney,
City of Long Beach,

SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
MAR 10 1959
JOHN R. BROWNING, Clerk

RECEIVED
MAR 9 1959
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 656

THE CITY OF LOS ANGELES, a municipal corporation, the CITY OF LONG BEACH, a municipal corporation, ROGER ARNEBERGH, WALFRED JACOBSON,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and C. LYN FOX, PETER E. MITCHELL, MATTHEW J. DOOLEY, THEODORE H. JENNER and EVERETT C. McKEAGE, as members of and constituting the said Public Utilities Commission,

Appellees.

On Appeal from the Supreme Court of the State of California.

BRIEF AMICI CURIAE OF THE CITIES OF AZUSA, BERKELEY, BEVERLY HILLS, BURBANK, CULVER CITY, FRESNO, GLENDALE, MODESTO, OAKLAND, PASADENA, POMONA, SACRAMENTO, SAN DIEGO, SAN FERNANDO AND TORRANCE, MUNICIPAL CORPORATIONS OF THE STATE OF CALIFORNIA.

HARRY C. WILLIAMS,
City Attorney, Azusa, California

FRED C. HUTCHINSON,
City Attorney, Berkeley, California

ROBERT E. MICHALSKI,
City Attorney, Beverly Hills, California

ARCHIE L. WALTERS,
City Attorney, Burbank, California

M. TELLEFSON,
City Attorney, Culver City, California

JOHN H. LAUTEN,
City Attorney, Fresno, California

HENRY McCLERNAN,
City Attorney, Glendale, California

ALLEN GRIMES,
City Attorney, Modesto, California

JOHN W. COLLIER,
City Attorney, Oakland, California

FRANK L. KOSTLAN,
City Attorney, Pasadena, California

ARLO E. RICKETT, JR.,
City Attorney, Pomona, California

EVERETT M. GLENN,
City Attorney, Sacramento, California

JEAN DU PAUL,
City Attorney, San Diego, California

NEVILLE R. LEWIS,
City Attorney, San Fernando, California

STANLEY E. REMELMEYER,
City Attorney, Torrance, California

Subject Index

	Page
Interest of amici curiae	1
Summary of argument	3
Argument	4
I. The Fourteenth Amendment insists upon a full due process hearing before increases in public utility charges can be finally effected by administrative state action. The judgment below must fall, since it ignores that requirement	4
II. The appeal raises substantial federal questions	6
Conclusion	8

Table of Authorities Cited

Cases

	Pages
Hollis v. Kutz (1921), 255 US 452, 65 L ed 727, 41 S Ct 371	5
Wichita Railroad & Light Co. v. Public Utilities Commission (1922), 260 US 48, 67 L ed 124, 43 S Ct 51	6

Codes

California Public Utilities Code:	
Section 728	4
Sections 734 and 1709	5

Constitutions

United States Constitution, Fourteenth Amendment..2, 3, 4, 6, 7, 8

Rules

Supreme Court Rules, Rule 42(4) 2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 656

THE CITY OF LOS ANGELES, a municipal corporation, the CITY OF LONG BEACH, a municipal corporation, ROGER ARNEBERGH and WALHFRED JACOBSON,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and C. LYN FOX, PETER E. MITCHELL, MATTHEW J. DOOLEY, THEODORE H. JENNER and EVERETT C. McKEAGE, as members of and constituting the said Public Utilities Commission,

Appellees.

On Appeal from the Supreme Court of the State of California.

BRIEF AMICI CURIAE OF THE CITIES OF AZUSA, BERKELEY, BEVERLY HILLS, BURBANK, CULVER CITY, FRESNO, GLENDALE, MODESTO, OAKLAND, PASADENA, POMONA, SACRAMENTO, SAN DIEGO, SAN FERNANDO AND TORRANCE, MUNICIPAL CORPORATIONS OF THE STATE OF CALIFORNIA.

INTEREST OF AMICI CURIAE.

Each of the cities joining in this *amici* brief is a municipal corporation of the State of California. Azusa, Beverly Hills, Burbank, Culver City, Glendale, Pasadena, San Fernando and Torrance are within the Los Angeles Extended Area, and they and their

industrial, commercial and individual residents are directly and adversely affected by Decision No. 55936 of the California Public Utilities Commission. Berkeley, Fresno, Modesto, Oakland, Pomona, Sacramento and San Diego are not within the Los Angeles Extended Area, but their interest, like the interest of the *amici* cities that are within the Los Angeles Extended Area, is in the basic question presented—the right of public utility customers, under the Fourteenth Amendment, to a full due process hearing upon a proposal that a state public utilities commission authorize a final increase in charges which such customers must pay.

This brief is filed pursuant to Rule 42(4) of this Court. The *amici* are political subdivisions of the State of California within the meaning of Rule 42(4), and this brief is sponsored by their authorized law officers.

The essential question involved upon this appeal does not affect the appellants only: it vitally affects practically every other individual and nearly every other city in the State of California. If the judgment below were to stand, the California Public Utilities Commission would inescapably be assured that it is fully possessed of unlimited power to authorize final increases in utility charges without any notice or hearing. It would then have to be expected that thereafter the California Commission would exercise such *ex parte* powers with increasing frequency, that it would increasingly rebuff the efforts of California cities and others to bespeak the customers' interests,

and that finally rate increase proceedings would be conducted *in camera,* thus subverting essential principles of sound public administration, with incalculable harm to the public interest.

For these reasons the *amici* cities file this brief in support of the Court's taking jurisdiction and proceeding after a hearing upon the merits to a reversal of the judgment below.

SUMMARY OF ARGUMENT.

Customers of a regulated public utility are deprived of their properties without due process of law, in violation of the Fourteenth Amendment, if a state commission authorizes final increases in the utility's charges, where adequate notice of the increase proposal is not given, where evidence is not adduced in an open hearing, with an adequate opportunity for cross-examination, where there is not an adequate opportunity for the affected customers to offer evidence, or where otherwise a full due process hearing is not had.

If the judgment below were to stand and were to be followed elsewhere, the California Public Utilities Commission and every similar commission in the United States could proceed without hindrance by the Fourteenth Amendment to authorize final increases in utilities' charges without affording a due process or any other hearing to the affected customers.

If it were to be said that the California Commission and other commissions would nevertheless hold

hearings in most instances, the answer would be found in the lessons of history that men endowed with unrestricted power soon come to believe in their own omniscience and their own eternal rectitude.

If it were to be said that remedies may be found in appeals to the legislatures, a sufficient answer appears in the record below: although Section 728 of the California Public Utilities Code requires a full hearing, Decision No. 55936, Decision No. 56048 and Decision No. 56049 of the California Public Utilities Commission nullify that legislative requirement, and the judgment below sustains that action.

Thus, it is essential that this Court require obedience by California to the commands of the Fourteenth Amendment, by asserting its jurisdiction and reversing the judgment below.

ARGUMENT.

I. THE FOURTEENTH AMENDMENT INSISTS UPON A FULL DUE PROCESS HEARING BEFORE INCREASES IN PUBLIC UTILITY CHARGES CAN BE FINALLY EFFECTED BY ADMINISTRATIVE STATE ACTION. THE JUDGMENT BELOW MUST FALL, SINCE IT IGNORES THAT REQUIREMENT.

As shown by the appellants in their jurisdictional statement, three other telephone companies walked into an initial hearing upon a rate increase proposal of a fourth telephone company and joined with it in a motion, without prior notice, that the California Public Utilities Commission authorize annual increases of more than $15,000,000 in charges to cus-

tomers in the Los Angeles metropolitan area. The Commission entertained that motion over the appellants' objections, received a limited amount of evidence in its support, and on December 10, 1957, granted the motion by its Decision No. 55936.

The Commission thereafter continued its hearings, received a large volume of evidence upon the very issues raised by the motion for "interim" relief, and on May 6, 1958, entered its final determinations by its Decision No. 56652. In the meantime the four companies' customers in the Los Angeles area had paid some $5,000,000 in increases of charges, by the force of the "interim" order.

One would indulge in fantasy to suppose that the Commission would overrule its interim determination under such circumstances, for it had not provided for refunds in such an event, and California law would inhibit complaints by the customers to recover the sums thus unjustifiably extracted from them (California Public Utilities Code, Sections 734 and 1709: appellants' Jurisdictional Statement, Appendix (G), pp. 73 and 76).

Any such hope would in fact have been vain, for the Commission did conclude in its final order that according to the evidence finally adduced upon the whole record, its "interim" decision upon the partial evidence before it some seven months earlier had indeed been warranted.

Nearly forty years ago this Court held in *Hollis v. Kutz* (1921), 255 US 452, 65 L ed 727, 41 S Ct 371, that the customers of a regulated public utility are